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No. 90-1901

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

JANICE M. HAYES,
Real Party In Interest,

Petitioner,

v.

THOMAS BYER, ELIAS GHANEM and
LAS VEGAS MEDICAL CENTERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

JANICE M. HAYES
Attorney At Law
3391 S. El Camino Road
Las Vegas, Nevada 89102
(702) 871-5135
Counsel For Petitioner

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REPLY BRIEF

Janice M. Hayes, the Petitioner, respectfully submits this reply brief to the brief in opposition.

REPLY BRIEF

The respondents may not, in a technical sense, have raised any issues for the first time in their brief in opposition pursuant to Supreme Court Rule 15.6, but they intentionally presented many material misstatements, which which could affect this court's determination and which petitioner respectfully suggests may be sufficient cause for this court to consider disciplinary action under Supreme Court Rule 8.2, and to allow petitioner to file this Reply Brief.

(1) On the cover and also on page 1 of their brief in opposition and in the opening paragraph, respondents state that the court's term is 1991, whereas it is, of course, 1990, and that the petition for writ of certiorari is to the "Supreme Court of Nevada," whereas it is to the United States Court of Appeals

for the Ninth Circuit.

(2) Respondents further this deception by stating on page 6 that "it seems that Hayes is relying on the first two considerations contained in Rule 10." United States Supreme Court Rule 10.1(b) refers to situations where a state court has decided a federal question in a way that conflicts with a decision of another state court of last resort or a United States court of appeals.

The instant action was filed in a federal court and was thus never before the Nevada Supreme Court.

(3) Respondents falsely state on page 1 in their opening paragraph that the petition for writ of certiorari was filed on May 30, 1991, whereas they well know that the petition was timely filed on May 24, 1991, pursuant to an extension of time granted by the Honorable

Sandra Day O'Connor, and that the Clerk would not otherwise file it.

(4) Respondents have entitled their brief, Estate of Kathleen Jo Price, Deceased, et al. v. Bally's Grand, et al., although they were advised by petitioner that the Clerk of this Court instructed her that the case caption should be: Janice M. Hayes v. Thomas Byer, et al.

One edition of the U.S. Law Week lists the title as first stated, while another edition lists it as Hayes v. Byer.

(5) Respondents imply at page 7 of their brief that petitioner presented "accusations of judicial malfeasance," as to judges of the district court and the court of appeals.

Hayes did not. She presented arguments that the district court erred in entering three separate orders with

Rule 54(b) certifications wherein the court omitted the requisite phrase that "there is no just reason for delay," from which Hayes as counsel was compelled to take appeals and to ask the court of appeals to dismiss said appeals for want of an appealable order.

The court of appeals erred in not immediately dismissing said appeals, and Hayes was forced to file unnecessary and futile Docketing Statements and briefs, No. 87-1941 as to defendant Transamerica, 87-2309, as to the Ghanem defendants, and part of 87-2575, as to defendants Trustees of the Nevada Resort Association Health And Welfare Trust, as set out in the petition herein.

(6) Respondents were dismissed for want of subject matter jurisdiction, and not on the merits. There was a stayed state court action, wherein the state court also dismissed claims

the respondents herein for want of subject matter jurisdiction, creating an anomalous situation in which neither court dismissed on the merits, which leaves Hayes's clients without a remedy as to these defendants.

The state court action was filed after a Special Administratrix had been appointed, and thus no issue of substitution arose therein.

The federal district court never reviewed its defective dismissal for want of subject matter jurisdiction after the court of appeals dismissed No. 87-2309, pertaining to respondents herein although they were not named in the Order, Pet. 12a., entered on May 2, 1988, after the instant appeal, No. 87-2575, was filed.

As petitioner relates hereafter,

the issue of proper substitution of a deceased party is a recurrent one in this and two other pending cases in which Hayes is counsel, with conflicting orders of the district court and conflicting orders of the court of appeals in different cases.

II

The petitioner respectfully suggests the rules of this court and especially the intent and spirit of Supreme Court Rule 15.1, governing briefs in opposition to a petition for a writ of certiorari have been completely and intentionally ignored by the respondents, as set forth at pages 2, 3 and 4 herein.

The fact that respondents made such obvious and silly misstatements as to the proper lower court, the term of this court and that Hayes is allegedly

petitioning from a a non-existent state court action and order, suggest that respondents are relying on a purported lack of jurisdiction in the lower courts as to plaintiff Estate Of Kathleen Jo Price, Deceased, the lead plaintiff.

Supreme Court Rule 15.1 admonishes respondents that they have an obligation to the court to point out any perceived misstatements in the brief in opposition, and not later.

The only exception is want of jurisdiction. Rule 15.1 provides that "Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to attention of the Court by the respondent in the brief in opposition."

In the instant case, petitioner relied on the statement made by District JUdge Howard McKibben, in denying the

motion of defendants other than the respondents to dismiss the action because plaintiffs had not moved to substitute the Estate Of Kathleen Jo Price in their (First) Amended Complaint, filed due to Price's death, as a party, that said omission was a "procedural defect," and not a jurisdictional one, which could be waived by the court. No defendant challenged this oral order, which is in the transcript of the hearing.

When plaintiffs filed the Second Amended Complaint, as ordered to do on five days notice, they did not, therefore, move to substitute the Estate.

Hayes raised this issue in the hearing in the instant matter, but the court of appeals panel apparently decided that it was not important as they proceeded with the hearing on sanctions.

The issue of substitution has arise in two other pending cases in the Nevada District Court, in which Hayes is counsel.

In CV-S-89-848, Janice Hayes v. Benny Binion, et al., the lead defendant died twenty-four days after Hayes filed the action. Benny Binion claims an interest in certain land and Hayes also has an interest which, under Nevada law, can not be abridged by any court or entity.

The issue therein is that Binion and other defendants have interfered with said right and have transferred or otherwise disposed of the land and other land acquired under various public land statutes and concealed said matters from Hayes.

Hayes wants to trace profits and to ascertain if Binion's interest was placed in a gaming trust under Nevada Revised Statute 463.341.

The Executrix was appointed on June 1, 1990, and Letters Testamentary were

issued on that date and Hayes caused Mrs. Binion, Teddy Jane Binion, to be personally served by the Clark County Sheriff's Office on that date.

In August, 1990, Hayes filed a Motion For Substituion. Judge Philip Pro dismissed the claims against Benny Binion, his Estate and Mrs. Binion as Executrix and trustee of trusts, along with dismissing other defendants, and subsequently ordered Hayes to file a Second Amended Complaint.

Judge Pro certified said order of dismissal, and three others as to other defendants under Rule 54(b) in separate orders. He declared that the motion for substitution was "moot."

On appeal, Case No. 91-15271, a motions panel ruled that the motion for substitution and other orders "appeared not to be final orders," and ordered Hayes to file an Opening Brief without

raising that issue as well as the district court's order striking Hayes Second Amended Complaint, which the court had ordered her to file and a Notice Of Lis Pendens.

Hayes has been forced to take two appeals already in the Binion case and the court of appeals refuses to consolidate said appeals thus necessitating filing two Opening Briefs. Judge Pro also imposed sanctions against Hayes in the lower court.

In Case No. CV-S-85-146-HDM, Fireman's Fund Life Insurance Company v. Janine Adamick, the district court, however, allowed Fireman's to file an Amended Complaint naming the Estate of Kathleen Jo Price as a party without moving for substitution. The Amended Complaint was as of right.

In that case and a consolidated one, the district court also entered four

Rule 54(b) certifications, including one in which he attempted to "refer" what he described as the "ultimate issue," being whether Fireman's must pay proceeds due on life insurance policies, to a state court judge, who declined to accept the "referral" in an action stayed since 1987.

CONCLUSION

The petitioner respectfully suggests that this Honorable Court should grant the petition for writ of certiorari to resolve issues raised therein, which reoccur frequently in the Ninth Circuit.

Respectfully submitted,

JANICE M. HAYES
Counsel Of Record For
Petitioner, Janice M.
Hayes.
3391 S. El Camino Rd.
Las Vegas, NV 89102
(702) 871-5135
Nevada Bar #1881